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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 787

L. McLEOD,

Petitioner,

vs.

M. C. THRELKELD, ET AL., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEON C. LEVY,
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Counsel for Petitioner.

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INDEX.

Table of Cases Cited.

FEDERAL STATUTES.

MISCELLANEOUS.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, L. McLeod, prays that a writ of certiorari be issued to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on December 9, 1942, affirming the decree of the Federal District Court for the Southern District of Texas, Houston Division.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals, filed December 9, 1942, is in the record (R. pp. 31-34) and is re-

ported in 131 Fed. (2d) 880. The opinion of the District Court is in the record (R. pp. 17-22) and is reported in 46 Fed. Supp. 208.

II.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347); and under 28 U. S. C. 832.

III.

Summary Statement of the Matter Involved.

This is an appeal from a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decision of the District Court, holding that the petitioner herein was not entitled to recover compensation for an alleged violation of the Fair Labor Standards Act of 1938 because his employment was not of such a nature as to be covered by the terms of that Act.

The suit was instituted in accordance with the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201 *et seq.*

The case was decided by the District Court upon a stipulation of facts which were, briefly, as follows: Threlkeld Commissary Company, a partnership, doing business in several States (R. pp. 14-19), holds contracts with the Texas and New Orleans Railroad Company to furnish meals and bedding to the railroad company's maintenance-of-way employees. Most, but not all, of these employees board with the respondent herein at stipulated prices which vary according to the type of "gang" in which they work. The railroad company is authorized in writing by the employees

to deduct from their wages the proper amounts and pay it over to the Commissary company.

Meals are cooked and offered to the employees in a cook-and-dining car, running on the railroad company's tracks. This car travels with the maintenance crew along the lines of the railroad. Each such car is in charge of a cook who prepares and serves the meals and keeps the car clean. In the event of emergency work being required of the maintenance crew, the cook must follow the crew to the site of the work and serve meals during such emergency. Petitioner herein was employed by the Respondent Commissary company as a cook from July, 1939 until May, 1941 and performed, within the State of Texas, the duties described above (R. pp. 12, 13, 18).

The Texas and New Orleans Railroad Company is a common carrier and is engaged in the interstate transportation of goods and persons. The railroad employees who board with respondent herein are engaged in the maintenance of railroad lines for the safe and proper transportation of goods and persons in interstate commerce. Railroad companies differ in their methods of providing these facilities for their workmen: some of them enter into contracts with commissary companies; others operate the cook-and-dining cars themselves; others provide the cars and allow the employees to prepare and provide their own food; still others make no provision whatsoever for the employees (R. pp. 13, 14).

The District Court held that neither the employee nor the employer were engaged in interstate commerce within the meaning of the Act (R. p. 22) and entered judgment for Defendant, Respondent herein. The United States Circuit Court of Appeals, upon an appeal by the Plaintiff, petitioner herein, *in forma pauperis,* affirmed the decision of the lower Court (R. pp. 31-34).

IV.

Question Presented.

The sole question presented herein is whether the petitioner, an employee engaged as a cook to prepare and serve meals to maintenance-of-way employees of a railroad, which employees are engaged in interstate commerce, is himself engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.[1]

V.

Reasons for Granting the Application.

A. The decree of the Honorable Circuit Court of Appeals is in conflict with the decisions of this Honorable Court in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, holding that a cook employed in preparing meals for a maintenance-of-way crew was engaged in interstate commerce; *Overstreet* v. *North Shore Corp.,* 63 Sup. Ct. —, holding that the employees of a toll road lying entirely within one State are engaged in interstate commerce and with *Pederson* v. *Fitzgerald Construction Co.,* 63 Sup. Ct. —.

B. The decree of the Honorable Circuit Court of Appeals is in conflict with the holding of the Circuit Court of Appeals for the Ninth Circuit in *Womack* v. *Consolidated Timber Co.,* 132 F. (2d) 101, wherein it was held that a cook employed in a cookhouse at a lumber camp which produced goods for interstate commerce was entitled to the benefits of the Fair Labor Standards Act.

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[1] The exemption of Section 13 (a) (2) of the Act, although not affirmatively plead by respondent, has received the attention of the courts below. Petitioner's reasons for the inapplicability of that exemption are given in this brief. (*Infra,* pp. 11-14).

C. The decision of the Honorable Circuit Court of appeals raises an important question of federal law which has not been, but should be, settled by this Honorable Court.

VI.

Supporting Brief and Argument.

A. Petitioner was engaged in interstate commerce within the meaning of the Act.

Both the District Court, 46 Fed. Supp. 208, and The Circuit Court of Appeals, 131 F. (2d) 880, held that the language of the Act with respect to "production of goods for commerce" is broader than the language of the Act in regard to "commerce". Seemingly, both courts admitted that were the petitioner employed in cooking and serving meals to employees who were *producing* goods for interstate commerce, instead of to employees who were engaged *in* interstate commerce, that the decision in *Kirschbaum* v. *Walling,* 316 U. S. 517, 2 Sup. Ct. 1116 (1942) would apply, and it would follow that the petitioner would be held within the coverage of the Act. Certainly such has been the decision of several lower courts. *Womack* v. *Consolidated Timber Co.,* 43 Fed. Supp. 625, the point affirmed in 132 F. (2d) 101, 9th Cir.; *Ikola* v. *Snoqualmie Falls Lumber Co.,* 4 Wage Hour Rept. 470, reversed on procedural grounds in 121 Pac. (2d) 369; *Lagerstrom* v. *Hanson,* 5 Wage Hour Rept. 471, on appeal to the Eighth Circuit Court of Appeals.

The *Kirschbaum* decision, supra, applies to employees whose work is necessary to the continuation of interstate commerce as well as to employees whose work is necessary to the production of goods for commerce. The Fair Labor Standards Act, a remedial statute, cannot and does not contemplate any distinction between the work of one whose employer *produces* goods *for* commerce and one whose em-

ployer is engaged *in* interstate commerce. Both the stipulated policy of the Act and the economic motives inspiring its passage rule out any contrary conclusion, for a construction of the Act which recognizes a labor standard for employees necessary to production and a different labor standard for employees necessary to commerce violates the very purpose for which the Act was intended: *i. e.*, the elimination of labor cost differentials which lead to labor disputes "burdening and obstructing commerce and the free flow of goods in commerce" (Section 2 (a)).

The Courts below evidently rely upon the fact that the Fair Labor Standards Act constains no definition of the term "engaged in commerce", while defining the term "production" of goods for commerce.[2] But the lack of such definition—and, it is submitted, it was a studied and deliberate omission—may be explained by a cursory examination of the judicial decisions which were in existence at the time of the consideration and passage of this legislation. There was no necessity for the Congress explicitly to define a term which had, by repeated judicial construction, acquired a definite meaning and which had been held to include work of employees which promoted interstate commerce. This Honorable Court had, on numerous occasions, ruled that an employment to perform work "which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce * * *". *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133; Also *Pederson* v. *Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 151; *Louisville & Nashville R. R.*

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[2] Sec. 3 (j): "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State".

Co. v. *Parker,* 242 U. S. 13, 14, 15; *Philadelphia & Read. Ry. Co.* v. *Di Donato,* 256 U. S. 327, 329-331; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571; *Rader* v. *Baltimore & Ohio Ry. Co.,* 108 F. (2d) 980; *So. Pac.* v. *Industrial Accident Comm.,* 251 U. S. 259.

Many of these cases, decided by this Honorable Court, arising under the Federal Employers Liability Act,[3] and holding that the employees were engaged in interstate commerce, were decided and the decisions announced prior to the amendment of that Act, on August 11, 1939, extending the scope of the Act to employees whose activities in any way directly or closely and substantially "affected" interstate commerce.[4] And in these cases, decided prior to the amendment, the Court followed the familiar doctrine that wherever was found a close and substantial relationship between the work done by the worker and interstate commerce, there was coverage under the Act. These cases were not decided upon the theory that the work merely *affected* interstate commerce but upon a finding that the worker was engaged *in* interstate commerce, as required by the Federal Employers Liability Act prior to the 1939 amendment.

The similarity between the Federal Employers Liability Act and the Fair Labor Standards Act, insofar as the "coverage" language used is concerned, has been noted by this Honorable Court in the recent case of *Overstreet* v. *North Shore Corp.,* 63 Sup. Ct. —, decision announced February 1, 1943. It was there pointed out that not only is the same term—"engaged in commerce"—used in both

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[3] Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C., sec. 51.

[4] 45 U. S. C. A. 51: "—any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter".

statutes, but also both are "aimed at protecting commerce from injury through adjustment of the master-servant relationship—".

The full force of the decisions of this Honorable Court were brought to bear upon the Congress at the time the Fair Labor Standards Act was under consideration.[5] It was not essential, therefore, that the Congress specifically define a term which had been the recipient of recent judicial construction. On the other hand, the use of the word "production" (for commerce), required that the Congress be more explicit in order to accomplish the result for which the legislation was intended. Neither in the Congressional debates, in the Act itself, nor in the expressed policy of the Act, is found any intimation of an intention to differentiate, as to coverage, between the applicability of the terms "in commerce" and "production for commerce", as the Courts below have construed the Act.

The decisions of this Honorable Court, construing the Fair Labor Standards Act, lend credence to the proposition that the Act is not to be restricted as has been held by the Courts below in this cause. *Overnight Transportation Co.* v. *Missel,* 62 Sup. Ct. 1216 (1942); *Kirschbaum* v. *Walling, supra.* In *Walling* v. *Jacksonville Paper Co.,* 63 Sup. Ct. —, decided on January 18, 1943, this Court said: "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce".

The lower Courts have likewise so held. *Lorenzetti* v. *American Trust Co.,* 45 Fed. Supp. 128, on appeal to the 9th Circuit; *Stoicke* v. *First National Bank of the City of New York,* 5 Wage Hour Rept. 560 (Sup. Ct. N. Y. App.

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[5] See 83 Cong. Rec., 75th Cong. 3rd Sess. Pt. 7, p. 7434 and Pt. 8, pp. 9168-71. See also Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), Pt. 1, pp. 42-43.

Div. 1st Dep't 1942); *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. (2d) 655, 10th Cir.; *Fleming* v. *American Stores Co.,* 42 Fed. Supp. 511, on appeal to the 3rd Cir.; *Mortenson* v. *Western Light & Telephone Co.,* 42 Fed. Supp. 319; *Steger* v. *Beard & Stone Electric Co.,* 4 Wage Hour Rept. 411; *Spinner* v. *Waterways Fuel & Dock Co.,* 41 N. E. (2nd) 144 (Ohio, 1942); *Walling* v. *Helena-Glendale Ferry Co.,* decided December 23, 1942 by the 8th Circuit Court, not yet reported. See also *Pickett* v. *Union Terminal Co.,* 33 Fed. Supp. 244, reversed on other grounds in 118 F. (2d) 328, affirmed in 315 U. S. 386; *Morgan* v. *Atlantic Coast Line R. R. Co.,* 32 Fed. Supp. 617; *Williams* v. *Atlantic Coast Line R. R Co.,* 3 Wage Hour Rept. 82, holidng that maintenance-of-way employees of a railroad are engaged in interstate commerce and are covered by the provisions of the Fair Labor Standards Act.

Indeed, this Honorable Court had decided a case under the Federal Employers Liability Act the facts of which are nearly parallel to those in this case. In *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, 103-104, the Court found that a cook employed in preparing and serving meals for a maintenance-of-way crew, following the crew along the lines of the railroad, was "engaged in commerce" within the meaning of the Federal Employers Liability Act because he was employed "* * * no doubt with the object and certainly with the necessary effect of forwarding their work by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had * * *". The labor done by the cook in the *Smith* case, the conditions under which it was performed and the position of that employee generally were identical with the labor done, the conditions under which it was performed and the position of the petitioner in this case.

The sole test to be applied in determining coverage under the Fair Labor Standards Act, as under other statutes governing interstate commerce and requiring that the employee be engaged "in commerce" is whether the work of the employee facilitates or promotes interstate commerce; whether there is such a close and substantial relationship between the work performed by the employee and interstate commerce itself that the former is, in effect, a part of such commerce. This test, often applied, has recently received the approbation of this Honorable Court. In *Overstreet* v. *North Shore Corp. supra,* this Court, in reversing the decision of the Fifth Circuit Court of Appeals, held that the employees of a company operating a toll road, lying entirely within the State of Florida, were engaged in interstate commerce and were entitled to the benefits of the Act because their work was essential to the continuation of interstate commerce. The decision of the Circuit Court was based upon the assertion that the work of these employees merely "affected" interstate commerce and therefore could not come within the ambit of the Fair Labor Standards Act. This Honorable Court, in reversing that holding, pointed out that the practical test announced in *Pederson* v. *Delaware, Lack. & West. R. R. Co.,* 229 U. S. 146, should apply and that "* * * those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' * * *. And the same is true of operational employees whose work is just as closely related to the interstate commerce".

Further, answering the contention that the respondent in that case was not "engaged in commerce but only in providing facilities which those engaged in commerce may use", this Court "did not regard (the) objection well taken".

This Court, in the *Overstreet* case, cited with approval the decision in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250

U. S. 101, a case on which petitioner herein relies; and noted the similarity between the aims and the applicability, as to coverage, of the Federal Employers' Liability Act and the Fair Labor Standards Act of 1938.

In another recent case, decided by this Honorable Court on February 1, 1943, the argument that the interposition of an independent contractor changes the status of the employee, insofar as coverage was concerned, was specifically rejected. *Pederson* v. *Fitzgerald Construction Co.* It will hardly be denied that the applicability of Sections Six and Seven of the Fair Labor Standards Act depend entirely upon the nature of the work done by the employee and not upon the nature of the employer's business. *Kirschbaum* v. *Walling,* 62 Sup. Ct. 1116 (1942); *Overstreet* v. *North Shore Corp., supra; Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. —, 87 Adv. Sheet 99; *Walling* v. *Jacksonville Paper Co.,* 63 Sup. Ct. —, decided January 18, 1943. The position, therefore, that the Fair Labor Standards Act does not apply to petitioner merely because he was employed by an employer other than the railroad company itself is, it is submitted, in the light of recent decisions of this Court, without merit.

B. Petitioner Was Not Engaged in a "Service Establishment" and the Exemption of Section 13 (a) (2) of the Act Does Not Apply to Respondent's Business.

The respondent has not affirmatively plead the defense of Section 13 (a) (2) of the Act [6] and the defense, if any it is, is therefore not available to it. *Cooper* v. *Gas Corp. of Michigan,* 4 Wage Hour Rept. 550 (C. C. Mich., Mason County, 1941); *Thornberg* v. *E. T. & W. N. C. Motor Transp.*

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[6] Section 13 (a) (2): "The provisions of sections 6 and 7 shall not apply with respect to • • • (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce • • •".

Co., 157 S. W. (2d) 823 (Tenn. 1940); *Pyron* v. *Arnold*, 21 S. E. (2d) 461 (Ga. 1942); Cf. *McKelvey* v. *U. S.*, 260 U. S. 353, 357. Furthermore, the respondent has not shown, as is required of one who relies upon an exemption from a remedial statute, that the activities are "within the words as well as within the reason" for the exemption. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56; *Bowie* v. *Gonzalez*, 117 F. (2d) 11.

However, both the District Court and the Circuit Court of Appeals touched upon the matter of the exemption and the petitioner therefore deems it not improper to outline the reasons why, had the exemption been properly plead, it would not be applicable to the respondent's business.

Section 13 (a) (2), granting an exemption, is to be strictly construed as against the party claiming such exemption. *Fleming* v. *Hawkeye Pearl Button Co., supra; Bowie* v. *Gonzalez, supra.* The respondent, in order to bring himself within this exemption, must assert that the commissary car in which the petitioner performed his duties was and is akin to a public restaurant. It is readily admitted that a restaurant, engaged in preparing and serving meals to the general consuming public, in competition with other like establishments for the public's trade, is entitled to the exemption of Section 13 (a) (2). Both lawyers and laymen consider it a service establishment—one which renders a service to the general public. Placing the label of "restaurant" upon a commissary car, however, does not make it so. *Nomina mutabilia sunt, res autem immobiles.*

A service establishment is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods". *Fleming* v. *Kirschbaum*, 124 F. (2d) 567, affirmed 62 S. Ct. 1116 (1942); and one wherein the "principal activity—is to furnish services to the con-

suming public" (Ibid.). It is established that the commissary car here did not sell meals to the general consuming public (R. 15, 16), and that it was used only by the employees of the railroad (R. 15, 16).

Restaurants are located at points easily accessible to the general public; they cater to the passers-by. Commissary cars are operated, as was the one in which the petitioner performed his duties, only for the maintenance-of-way crew, whom the car follows along the railroad line. Restaurants advertise, belong to various trade Associations, seek the trade of travelers, transient persons and the general public. Commissary cars do not (R. pp. 15, 16). It is a matter of common knowledge that there are vast distances, uninhabited, along railroad lines, particularly in the western and southwestern States, where it would be a physical impossibility for maintenance-of-way crews to receive board and lodging except through the use of a commissary car. These cars are, in fact, a necessary adjunct to the equipment and to the work of these maintenance-of-way crews. *Philadelphia, B. & W. R. R. Co.* v. *Smith, supra.*

It has been held that cookhouses in lumber camps do not fall within the exemption of Section 13 (a) (2). *Womack* v. *Consolidated Timber Co.,* 132 Fed. (2nd) 101, 9th Cir. And it may be conservatively stated that the position of the cookhouse in a lumber camp and that of a commissary car on a railroad line are, for purposes of the exemption, similar.

The fact that the petitioner was employed by an independent contractor, respondent herein, rather than by the railroad company itself does not change his status. His duties, the results of his efforts and the conditions under which the work is performed are exactly the same, whether he be employed by the respondent or by the railroad company. If the petitioner were employed directly by the railroad company, he would not have been engaged in a "serv-

ice establishment''. If, by the simple expedient of contracting with an independent contractor for the performance of such work, it were possible to avoid the requirements of such legislation, a great many functional operations in interstate commerce, as well as jurisdiction of the proper authority thereover, could be completely avoided. It is submitted that such was not the intent of the Congress and this Court has correctly so indicated in the decision in *Pederson* v. *Fitzgerald Construction Co.*, 63 Sup. Ct. — decided February 8, 1943.

But assuming, for the purpose of the point, that the commissary car were within the exemption of a ''service establishment'', respondent stands in no better position, for the requirement that the ''greater part of * * * the * * * servicing * * *'' must be in intrastate commerce is not met. The railroad company being engaged in interstate commerce (R. p. 20), the work of the maintenance-of-way employees and that of the cook being a part of such commerce, it is obvious that the greater part, if indeed not all, of the commissary car's service is in interstate commerce. If the ''service'' rendered is part of the railroad's interstate operations, the greater part of such servicing is in interstate commerce. See *Fleming* v. *Arsenal Building Corp.*, 125 Fed. (2nd) 278, 2nd Cir., affirmed 62 Sup. Ct. 1116 (1942).

Conclusion.

The decision of the Court below is in conflict with the decisions of this Honorable Court in *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101; *Overstreet* v. *North Shore Corp.*, 63 Sup. Ct. — and *Pederson* v. *Fitzgerald Construction Co.*, 63 Sup. Ct. —. It is also in conflict with the decision of the Ninth Circuit Court in *Womack* v. *Consolidated Timber Co.*, 132 Fed. (2nd) 101 and the decision of the Court below raises an important question of federal law

which has not been, but should be, settled by this Honorable Court.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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